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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company,

Respondents,

v.

Clayton E. Runck, Jr., Herman Sobania and George Schulz,

Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a civil case, in which an insurance company seeks a refund of losses paid on an insurance policy and alleges that the defendant committed arson, may be compelled to answer potentially incriminating questions, where he has consistently claimed the privilege against self incrimination under state and federal law.
2. Whether the protection, provided by the Fifth and Fourteenth Amendments to the United States Constitution, against self incrimination can be invoked to protect an American citizen against self incrimination as to crimes committed in a foreign country, in this case Canada.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ..... i

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTIONAL STATEMENT..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

POINT I--THE PRIVILEGE AGAINST SELF INCRIMINATION SHOULD BE HELD TO APPLY TO PROTECT AMERICAN CITIZENS AGAINST SELF INCRIMINATION AS TO ALLEGED CRIMES COMMITTED IN CANADA. THIS COURT HAS NEVER SPECIFICALLY RULED ON THE QUESTION. THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA IN THIS CASE AND SOME FEDERAL DECISIONS DENY THE PRIVILEGE AGAINST SELF INCRIMINATION, WHILE OTHER FEDERAL DECISIONS SUPPORT IT..... 5

POINT II--ARSON IS A FELONY IN CANADA, THERE IS NO STATUTE OF LIMITATIONS IN CANADA AS TO FELONIES, AND ARSON IS AN EXTRADITABLE OFFENSE UNDER TREATIES BETWEEN CANADA AND THE UNITED STATES..... 9

POINT III--A STATEMENT BY THE CANADIAN CROWN PROSECUTOR THAT HE HAS NO PRESENT INTENTION OF PROSECUTING THE PETITIONERS IS NOT A SUFFICIENT BASIS FOR HOLDING THAT THERE IS NO DANGER OF PROSECUTION.... 11

POINT IV--THE FACTORS UPON WHICH THE NORTH DAKOTA SUPREME COURT RELIED IN RULING AGAINST THE PETITIONER CANNOT MAKE CONSTITUTIONAL THAT WHICH IS UNCONSTITUTIONAL..... 13

CONCLUSION..... 15

APPENDIX A--OPINION OF THE SUPREME COURT OF NORTH DAKOTA.....A-1

APPENDIX B--MEMORANDUM AND ORDER, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, 6TH DIVISION.....B-1

APPENDIX C--MEMORANDUM OF ISSUES, DISTRICT COURT OF CASS COUNTY, NORTH DAKOTA.....C-1

APPENDIX D--REQUESTS FOR ADMISSION, May 29, 1981.....D-1

## TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Murphy v. Waterfront Commission, 378 U.S. 52 (1964)..... 14

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972).. 6

UNITED STATES COURTS OF APPEALS

In re Baird, 668 F.2d 432 (8th Cir. 1982) 8

In re Corrugated Container Antitrust Litigation, 661 F.2d 1145 (7th Cir. 1981) (reh. en banc)..... 12

In re Federal Grand Jury Witness, 597 F.2d 1166 (9th Cir. 1979)..... 8

In re Folding Carton Antitrust Litigation, 609 F.2d 867 (8th Cir. 1979).....13,15

In re Grand Jury Proceedings, 559 F.2d 234 (5th Cir. 1977)..... 8

In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1979)..... 6,9

United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979)..... 14

United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977)..... 8

UNITED STATES DISTRICT COURTS

In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972)..... 6,7

In re Grand Jury Subpoena of Martin Flanagan, 533 F. Supp. 957 (E.D.N.Y. 1982)..... 7,10,12

Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981)..... 7,14

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V..... 1

U.S. CONST. amend. XIV..... 2

OTHER AUTHORITIES

Note, Fear of Foreign Prosecution and the Fifth Amendment, 58 Iowa L. R. 1304 (1973)..... 6

Note, Testimony Incriminating Under the Laws of a Foreign Country--Is There a Right to Remain Silen? 11 N.Y.U. J. Int'l L. & Pol., 359 (1978)..... 9

Note, 13 U. Mich. J. L. Rev. 435 (1980)..... 12

## OPINIONS BELOW

The opinion of the Supreme Court of North Dakota is reported at 317 N.W.2d 402. It is appended hereto as Appendix A. Appendix B consists of the recent order of the United States District Court for the District of Minnesota, reversing the prior order releasing testimony of the Grand Jury by two of the petitioners, testimony which was turned over to the plaintiffs in the present civil action. This is a reversal on an issue which the North Dakota Supreme Court refused to consider.

## JURISDICTION

The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. § 1257(3). The opinion was rendered on March 22, 1982, and became final 17 days thereafter.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V: "No person . . . shall be compelled, in any criminal case, to

be a witness against himself, . . ."

U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

The second amended complaint of the respondents (plaintiffs in the original action in the state courts of North Dakota) alleges that the petitioner Runck owned property in Starbuck, Manitoba, Canada, which was destroyed by a fire as a result of arson, that the three respondents knew of and participated in the arson and fraudulently concealed its existence from the insurance companies, thereby defrauding the insurance companies of $75,715. The allegations were denied by the defendants,

and discovery proceedings, including the taking of depositions and serving of interrogatories, took place. The respondents have consistently claimed the fifth amendment privilege against self incrimination, moved for a protective order, opposed motions for discovery made by the respondent insurance companies, and moved to suppress a grand jury transcript released by the Assistant United States Attorney for the District of Minnesota to the insurance companies (the subject of the order in Appendix B).

The petitioners resisted all efforts by the respondent insurance companies compelling them to testify as to matters tending to incriminate them in the alleged arson in Canada. The privilege was asserted against questions which included: the fire in Manitoba, the ownership of the property, the setting of the fire, the insurance proceeds, and other matters specifically related to the alleged crime and events leading up to it. See, e.g., requests for admission dated

May 29, 1981 (Appendix D).

The District Court of Cass County, North Dakota, eventually denied all of the motions of the petitioners in which their fifth amendment rights were asserted, and granted the motions of the respondent insurance companies to compel answers by the petitioners. The petitioners thereupon appealed the order of the Cass County District Court to the North Dakota Supreme Court, which affirmed the rulings of the District Court.

The federal constitutional questions were raised, a record made, and the points preserved for appeal at every stage. A related issue arises because of the disclosure of grand jury testimony given by two of the petitioners (Runck and Schulz) after being granted immunity from prosecution by the federal court. Without any showing of particularized need, the district judge allowed the release of the transcripts to the respondent insurance companies and they were turned over to, and used by, the

respondent insurance companies. More recently, another federal judge (Devitt) revoked the prior order, but the disclosure had already been made. A copy of the latter order is attached as Appendix B.

In the present case, none of the reasons for not reaching the main issue--whether the privilege against self incrimination applies against foreign prosecutions--is present. Grand jury secrecy has been breached, the danger is real, and the crime, if any, occurred on Canadian soil and is subject to to extradition.

## REASONS FOR GRANTING THE PETITION

### POINT I--THE PRIVILEGE AGAINST SELF INCRIMINATION SHOULD BE HELD TO APPLY TO PROTECT AMERICAN CITIZENS AGAINST SELF INCRIMINATION AS TO ALLEGED CRIMES COMMITTED IN CANADA. THIS COURT HAS NEVER SPECIFICALLY RULED ON THE QUESTION. THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA IN THIS CASE AND SOME FEDERAL DECISIONS DENY THE PRIVILEGE AGAINST SELF INCRIMINATION, WHILE OTHER FEDERAL DECISIONS SUPPORT IT

The Supreme Court of the United States has never reached the constitutional question

of whether the fifth amendment privilege against self incrimination extends to a foreign prosecution. It has indicated that such a constitutional question would be presented if the matters inquired into might incriminate the witness under foreign law and would pose a substantial risk of foreign prosecution. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 92 S. Ct. 1670, 32 L.Ed. 234 (1972).

Most federal courts have recognized that the privilege against self incrimination may be invoked when a foreign prosecution is possible, although they have been split on the factual application of when this privilege exists. See In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1970); In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972). See also Note, Fear of Foreign Prosecution and the Fifth Amendment, 58 Iowa L. R. 1304 (1973). Federal cases which recognize the privilege against self

incrimination when foreign prosecution is possible include In re Grand Jury Subpoena of Martin Flanagan, 533 F. Supp. 957 (E.D.N.Y. 1982);
Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981);
In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

In Flanagan, a case which is factually similar to the extent that the possible crime occurred on foreign soil and that "no allegation of a pending prosecution" was made, 533 F. Supp. at 964, the court held that Mr. Flanagan's fear of foreign prosecution was reasonable and that the privilege against self incrimination extended to possible foreign prosecutions. Id. at 965.

The court went on to quote Judge Newman in Cardassi when he stated that "Zicarelli does not appear to require any indication that a foreign prosecution is imminent." ID. at 964 (citing In re Cardassi, 351 F. Supp. at 1085).

Several of the courts of appeals have impliedly recognized that the privilege may apply to a foreign prosecution situation. See In re Baird, 668 F.2d 432 (8th Cir. 1982); In re Federal Grand Jury Witness, 597 F.2d 1166 (9th Cir. 1979); United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); In re Grand Jury Proceedings, 559 F.2d 234 (5th Cir. 1977). In all of these cases the issue was not really decided because the court found the claim of incrimination to be too remote, or speculative, or because the court relied upon the secrecy of the grand jury proceedings or the acts in question occurred on American soil. Obviously, in the present case none of these considerations apply. The alleged arson occured in Canada and the secrecy of the grand jury has been breached. As for the likelihood of prosecution see discussion under point 3.

Cases holding to the contrary and refusing to recognize the right of self incrimination against foreign prosecution

include In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1970), and criticized quite severely in Testimony Incriminating Under the Laws of a Foreign Country--Is There a Right to Remain Silent?, 11 N.Y.U. J. Int'l L. & Pol., 359 (1978). The decision appealed, of course, follows the latter line of cases. The question is one which, at some time, must be and should be resolved by this court.

POINT II--ARSON IS A FELONY IN CANADA, THERE IS NO STATUTE OF LIMITATIONS IN CANADA AS TO FELONIES, AND ARSON IS AN EXTRADITABLE OFFENSE UNDER THE TREATIES BETWEEN CANADA AND UNITED STATES

Arson is a crime under Canadian law. See Chapter C-34, Revised Statutes of Canada, Sections 389 and 390, and Chapter E-21, Revised Statutes of Canada. There is no statute of limitations limiting prosecution for the crime of arson. See Canadian Abridgement (2nd edition), Volume 11, Criminal Law, Section 9889, 1968 publication,

which reads as follows:

> "Section 9889. General Rule. Unless there is a statutory provision for it, there is no time limitation on prosecution for an offense. At the common law, no time runs against the Crown."

Arson is an extraditable offense under the extradition treaty between the United States and Canada, Article 2, dated December 3, 1971. The treaty is conveniently found at 27 United States Treaties 983, and Arson is specifically mentioned as an extraditable offense at No. 20 of the Schedule at pages 997-9.

"Moreover, assurances that extradition is unlikely are insufficient to protect a witness." Flanagan, 533 F. Supp. at 965. The possibility that extradition could occur and that the petitioners could be prosecuted in that foreign country should be sufficient to trigger the privilege.

Thus, it is very clear that answering the questions posed by the respondent insurance companies would subject the

petitioners to a real danger of prosecution under the laws of Canada. Arson is a crime punishable by imprisonment in Canada and subject to extradition as required by international treaty. It is equally evident that no statute of limitations would prevent either the prosecution or the extradition. Therefore, the petitioners are subjecting themselves to the possibility of prosecution by answering the posed questions.

POINT III--A STATEMENT BY THE CANADIAN CROWN PROSECUTOR THAT HE HAS NO PRESENT ITENTION OF PROSECUTING THE PETITIONERS IS NOT A SUFFICIENT BASIS FOR HOLDING THAT THERE IS NO DANGER OF PROSECUTION

In an attempt to avoid the obvious danger of prosecution under Canadian law, the respondent insurance companies have obtained an affidavit from a Crown Attorney with the Department of the Attorney General for the Province of Manitoba, Canada, dated November 24, 1980, stating "that the Department of the Attorney General for the Province of Manitoba has no present intention of

initiating prosecution and/or extradition proceedings in regard to said fire."

Obviously, this would not preclude the Office of the Attorney General from changing its mind, the government of Manitoba could be changed at any time under it's parliamentary system of government, or the present Attorney General could resign. In any such case, the intention of the prosecution might very well change. As noted by the 7th Circuit in In re Corrugated Container Antitrust Litigation, 661 F.2d 1145 (7th Cir. 1981) (rehearing en banc), a non-binding letter of intent is not dispositive of a constitutional issue. Fifth Amendment rights cannot be stripped away based on tenuous predictions of future events. Constitutional rights are too vital to be sacrificed to such predications. Id. at 1152. See also, Note, 13 U. Mich. J. L. Rev. 435 (1980); Flanagan, 533 F. Supp. 957 (E.D.N.Y. 1982).

Under any test, the danger is real. But it need not be certain or even likely.

The 7th Circuit in In re Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979), concluded that "it is only when there is but a fanciful possibility of prosecution that a claim of Fifth Amendment privilege is not well taken." In this case the risk is far more than fanciful. It is real. The privilege should be sustained or the Constitution will be subverted.

POINT IV--THE FACTORS UPON WHICH THE NORTH DAKOTA SUPREME COURT RELIED IN RULING AGAINST THE PETITIONER CANNOT MAKE CONSTITUTIONAL THAT WHICH IS UNCONSTITUTIONAL

The opinion of the Supreme Court of North Dakota, although far from clear, seems to base its conclusion upon such factors as (1) that the petitioners did not raise the possibility of foreign prosecution when they were granted immunity from prosecution in the federal courts in Minnesota, and (2) that the drafters of our Constitution did not take into account the possibility of foreign prosecution when they drafted the Fifth Amendment.

The latter point is effectively answered by Murphy v. Waterfront Commission, 378 U.S. 52 (1964), where the history of the common law privilege was outlined in detail. See also Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981).

On the first point, the law is that the right to the testimony of a person granted immunity is only co-extensive with the immunity granted. See United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979).

The United States District Court for the District of Minnesota can give immunity from federal prosecution and from state prosecution, under Murphy v. Waterfront Commission, supra, but it cannot give immunity from prosecution in a foreign country. The privilege therefore continues to exist as to foreign prosecution.

Incidentally, the lower court in North Dakota decided the case on the basis of a overruled precedent. See Appendix C.

It relied on In re Folding Carton Antitrust Litigation, 465 F. Supp. 618 (N.D. Ill.), reversed 609 F.2d 867 (7th Cir. 1979). Nevertheless, the Supreme Court of North Dakota, using other and equally dubious standards affirmed it.

## CONCLUSION

The Fifth and Fourteenth Amendments prohibit compulsory self incrimination. Federal and state courts are in disagreement on whether the privilege extends to self incrimination as to a foreign prosecution.

In this case the petitioners, if they answer the questions being asked them in the state court proceedings, are in danger of incriminating themselves as to the crime of arson allegedly committed in Canada. Arson is a felony, and there is no statute of limitations. It is extraditable under the treaties between the United States and Canada. The only indication that they may not be prosecuted is non binding statement

of the present intention of a prosecutor in Canada, far from enough to remove the justifiable fear of prosecution by the petitioners.

The Supreme Court of North Dakota has affirmed a lower court judgment requiring the petitioners to answer questions which will tend to incriminate them in the commission of the crime of arson in Canada.

This Court should grant certiorari to the Supreme Court of North Dakota, and should decide the issue left open in Zicarelli, whether the constitutional privilege against self incrimination extends to foreign crimes, and should upon the merits decide that it does so extend, thereby guaranteeing the constitutional rights of American citizens.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

# APPENDIX A

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company,

Plaintiffs and Appellees

v.

Clayton E. Runck, Jr.,

Defendant and Appellant

Herman Sobania and George Schulz,

Defendants and Appellees

Civil No. 10 065

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Phoenix Assurance Company of Canada, Norwich Union Fire Society, Lte., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company,

Plaintiffs and Appellees

v.

Clayton E. Runck, Jr.,

Defendant and Appellant

Herman Sobania and George Schulz,

Defendants and Appellants

Civil No. 10 069

Phoenix Assurance Company of Canada, Norwich Union Fire Soceity, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company,

Plaintiffs and Appellees

vs.

Clayton E. Runck, Jr.,

Defendant and Appellant

Herman Sobania and George Schulz,

Defendants and Appellants

Civil No. 10 090

Appeal from the District Court of Cass County, the Honorable Norman J. Backes, Judge.

AFFIRMED IN PART AND EXERCISED ABSTENTION IN PART.

Opinion of the Court by Sand, Justice.

Vogel, Brantner, Kelly, Knutson, Weir & Bye, P.O. Box 1389, Fargo, for plaintiffs and appellees; argues by M. Daniel Vogel.

Roberg Vogel, Grand Forks, for defendant and appellant Clayton E. Runck, Jr.

Brian C. Southwell, 1108 West Broadway, Minneapolis, Minnesota, for defendants and appellants Herman Sobania and George Schulz.

Civil Nos 10065, 10069, 10090

Phoenix Assurance Co. of Canada
v.
Runck

SAND, Justice

These are consolidated appeals by the Defendants and appellants, Clayton E. Runck, Jr., Herman Sobania, and George Schulz, from a state district court's order granting plaintiffs' and appellees', Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company, [hereinafter collectively referred to as Phoenix] motions directing the defendants to respond to certain discovery procedures initiated by Phoenix and from the state district court's order denying the defendants' motion for a protective order from some of Phoenix's discovery proceedings and allowing Phoenix the continued use of grand jury transcripts and material in their case.[1]

The orders stem from an action initiated by Phoenix alleging insurance fraud perpetrated by the defendants[2] upon Phoenix as a result of a fire in starbuck, Manitoba, in December of 1971. Phoenix' amended complaint alleged, in substance, that Runck, a North Dakota resident, purchased a building in Starbuck, Manitoba, Canada, and insured it and its contents for $130,000; that later Runck and Sobania, a resident of Minnesota, transported and stored certain agricultural equipment in the building located on the land in Starbuck, Manitoba; that Runck, Sobania, and Schulz, a resident of North Dakota, made plans to burn the building and on or about 18 December 1971, Schulz and Sobania traveled to Starbuck, Manitoba, started, or made arrangements to start, a fire that resulted in the building burning to the ground; that Runck filed a proof of loss and received $75,175.00 from Phoenix; that the activities of the defendants constituted fraud and resulted in unjust enrichment; and that, as

a result, Phoenix was entitled to damages and restitution. Defendants answered with a general denial, and also asserted that the statute of limitations barred any such action.

Both sides subsequently initiated discovery proceedings. The defendants individually invoked the fifth amendment privilege, whereupon plaintiff moved for orders compelling responses and the defendants individually or collectively moved for protective orders. These and other motions and countermotions culminated in at least three different hearings before the state district court which ultimately issued the orders[3] granting plaintiffs' motions compelling discovery and denying defendants' motion to suppress the grand jury transcript and material.

The defendants separately appealed from these orders and the appeals were combined.[4]

Prior to reaching the merits of the defendants' appeal, we must discuss two

preliminary matters.

Phoenix filed a motion to dismiss Schulz' appeal because no brief was filed on behalf of Schulz. During oral argument we were informed by counsel for Sobania, who also filed the notice of appeal for Schulz, that the brief filed on behalf of Sobania also applied to Schulz because the issues were identical as to each. However, the issues are not identical. Schulz was granted immunity in exchange for testifying before the grand jury and, so far as the record before us reflects, Sobania did not testify before the grand jury, nor was he given immunity. Nevertheless, because of other similarities we will consider Schulz' appeal and deny Phoenix' motion to dismiss.

The second preliminary matter which we must consider is whether or not the orders issued by the state district court are appealable. Although the question was not raised by the parties, it is a matter of jurisdiction and this Court may dismiss the

appeal on our own motion if the orders are not appealable. Simpler v. Lowrey, ____ N.W. 2d____ (Civil No. 10,010, Feb. 24, 1982); Chas. F. Ellis Agency, Inc. v. Berg, 214 N.W. 2d 507 (N. D. 1974).

During oral argument several theories were suggested upon which we could reach the merits of this appeal. These theories treated the orders as affecting substantial rights of the parties which if lost cannot be undone and that the orders involved the merits of the action.

Ordinarily, orders relative to discovery procedures are interlocutory and not appealable. Northwest Airlines, Inc. v. State Board of Equalization, 244 N.W. 2d 708 (N.D. 1976). Interlocutory orders may be appealable if they involve the merits of the action. Section 28-27-02(5), North Dakota Century Code; Northwest Airlines, Inc. v. State Board of Equalization, supra.

In Northwest Airlines, Inc., supra at 710 we said:

> "The words 'merits of the action' cannot be clearly defined in any technical legal sense, however, they can be regarded as referring to significant legal rights as distinguished from technicalities relating to only procedure or form."

Although we recognize that discovery orders are not generally appealable, we believe the orders issued in this instance are appealable because they involve substantial constitutional rights which, if violated, may be so damaging as to cause irreparable harm. Cf. Burlington Northern v. North Dakota District Court, 264 N.W. 2d 453 (N.D. 1978) [petition to Supreme Court to exercise original jurisdiction].

The appeals raised two main issues: (1) Does the fifth amendment privilege against self-incrimination apply to possible foreign prosecution, and (2) What action should this Court take regarding the appeal from the district court's order denying the suppression of the grand jury transcript and material?

We will first consider the state district court's order denying the defendants'

motion to suppress the use of the grand jury transcript and materials and the defendants' appeal of that order to this Court.

Earlier the federal district court of Minnesota upon the application of the United States Attorney had issued an ex parte order permitting the disclosure of the grand jury transcripts and material "preliminarily to and in connection with judicial proceedings, namely civil litigation to recover losses due to possible arson and insurance fraud."

This order, as indicated by its caption, was issued pursuant to the provisions of Rule 6(e) (3) (C) (i), Federal Rules of Criminal Procedure. See In re Judge Elmo B. Hunter's Special Grand Jury Empaneled September 28, 1978 (30) Crim. L. Rep. 2331).

Thereafter the transcripts and grand jury material were made available to Phoenix.

The defendants' motion,[5] in the state district court, to suppress the use of the federal grand jury transcript and material,

which use was authorized by an ex parte order issued by a federal district court in Minnesota, in a limited sense, is comparable to an appeal to a state district court seeking a reversal of a federal district court's order.

During oral argument we were advised that appropriate steps are being taken to make the ex parte order authorizing the disclosure of the grand jury material and transcript issued by the federal district court appealable, and then appeal it to the appropriate court.[6]

In a somewhat analagous situation in which this Court declined to assume original jurisdiction, Justice Strutz, in a concurring opinion in State v. Meier, 127 N.W.2d 665, 674 (N.D. 1964), said:

> ". . . If our decision would be effective as a final judgment of this court, the reservation of the jurisdiction by the Federal District Court is entirely meaningless because that court has no appellate jurisdiction over the decisions of this court."

Conversely, we can add by saying

that state courts do not have appellate jurisdiction over federal district courts. Even though the federal district court did not specifically retain jurisdiction as was the case in State v. Meier, supra, the federal district had and continues to have jurisdiction over the subject matter and on that basis a hearing on the ex parte order can be held making such order appealable and an appeal can be processed through the Federal appellate channels. Unlike the Meier case, the federal court in this instance did not direct the matter to be brought to the state court. We believe the reference to a "court" in Rule 6, FRCrimP, is to a federal court, preferably the one in whose district the grand jury convened, rather than a state court. Even if appellate jurisdiction is not directly involved here, "we employ the doctrine of comity -- the court that first acquires jurisdiction of the question retains it, which in this case, is the United States district court. [Citation omitted.]"

State v. Meier, supra at 671. See also, Medical Arts Building, Ltd. v. Eralp, 290 N.W. 2d 241 (N.D. 1980), as to comity.

This suggests that in this instance a decision issued by a federal appellate court after reviewing the order of the federal district court, authorizing the use of the federal grand jury transcript and material, which came to the appellate court through the regular channel of appeals, would be given preference over a decision issued by a state court on a collateral matter, particularly on the issue whether or not the use of a federal grand jury transcript and material should be suppressed. As a result our opinion, in a sense, would only be advisory, which under our Constitution, is not permitted. Section 10, Article VI, N.D. Const.; State v. Meier, supra.

Furthermore, bifurcated procedures, including the equivalent of an appeal pertaining to the same subject matter, one in federal district court and one in state

courts, can result in endless confusion and therefore are not encouraged. See, Shark Brothers, Inc. v. Cass County, 256 N.W.2d 701 (N.D. 1977), regarding simultaneous proceedings before two governmental bodies of the state.

In addition, the material and evidence submitted and made available to the federal district court conceivably could be different from the material and evidence that was submitted to the state district court as well as to this Court and could be the basis for different conclusions. This would not promote the ends of justice.

Finally, taking into account the time during which the grand jury material has been available and used, a true suppression regarding its use, as distinguished from treating it as evidence in a trial, would be almost as difficult as trying to "unring a bell."

On the basis of the foregoing, we abstain[7] from entertaining or considering that portion of the North Dakota district court

order denying the motion to suppress the use of the federal court grand jury material referred to in the order of Judge Donald D. Alsop of the United States District Court of Minnesota, dated 30 November 1979.

In reaching this conclusion we nevertheless realize and conclude that the suppression of certain material such as a grand jury transcript declaring it inadmissible evidence at trial, as distinguished from its pretrial use is a different matter and depends upon the existing circumstances and subject matter under consideration by the state district court, which under the conditions is not only authorized but has the responsibility to rule on the matter in accordance with the applicable law on an individual item or collective basis. See Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1979)

The defendants contend that the state court erred in not allowing them to plead the fifth amendment regarding their activities pertaining to the fire in Canada.

The defendants argue that arson is a crime under Canadian law and is an extraditable offense under the extradition treaty between the United States and Canada. See Ch. C-34, Rev.Stat. Canada §§ 389 and 390, and Ch. E-21, Rev. Stat. Canada. They point out that Canada has no statute of limitations for arson.[8] As such, a threat of criminal prosecution in Canada against the defendants, including Runck, exists and if that becomes a reality the answers they are required to give could be used against them individually.

The defendants also assert that the communication from Canada expressing an intent not to prosecute is not an assurance because Canada could change its mind without any difficulty and then prosecute them.

The overriding constitutional issue in this respect is: Does the fifth amendment apply to possible foreign prosecution? If it does, what is the answer where the privilege has been supplanted with immunity by either a grant or by the witness

being compelled to testify?

It is now fairly well settled that the fifth amendment privilege against self-incrimination protects both state and federal witnesses under state as well as federal laws including military laws of this country. Murphy v. Waterfront Commission of New York, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964); Cooke v. Orser, 12 M.J. 335 (CMA 1982). The same applies where either a state or federal court compels a witness to testify and as a result the witness has immunity except as to perjury under NDCC § 31-01-09. Neither may use the compelled testimony against the witness. New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979); Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d. 274 (1973); and Murphy, supra.

In a related issue, the court, in United States v. Nemes, 555 F.2d 51 (2d Cir. 1977), held that whenever a witness who testified under grant of immunity is

prosecuted the government has the burden of showing that the evidence it proposes to use is derived from a legitimate source wholly independent of compelled testimony.

While the federal and state authorities recognize and respect the effect of immunity granted to a witness and also recognize the prohibition against using court-compelled testimony, we cannot say the same understanding and respect exists between nations. Neither does international law provide a plausible solution. A treaty between nations involved could provide for a similar relation and understanding that exists between the federal and state governments. However, no such treaty between the United States and Canada has been called to our attention and we are unaware of any. The treaty with Canada mentioned earlier does not cover this topic.

As an ad hoc solution the resident state of the witness could refuse extradition

on the grounds that the witness had immunity from either a grant or by having been compelled to testify. But we have a treaty with Canada to extradite. Furthermore, the extradition process is basically an executive function and we doubt if the judiciary constitutionally could unilaterally or on an ex parte basis command the executive officer not to honor the requests for extradition. Possibly a voluntary understanding could be reached between the judiciary and the executive on the basis that the government is partially responsible for having created the situation resulting in immunity for the witness by a grant or otherwise. Again, we have no indication that such comity would be recognized or could be employed by the executive branch in this situation because a treaty with Canada on extradition exists. This also raises the question as to other nations whether these concepts require a reciprocal understanding

(treaty) or if they may be implemented on a unilateral basis. We suggest that a unilateral implementation would only compound the apparent problems.

These concepts, presently, are no more than embryonic ideas which may be developed in the future but they are unavailable to solve the problems now under consideration either partially or otherwise.

Under the present posture, we need to determine if or to what extent the fifth amendment privilege applies to foreign prosecution. This question was before the United States Supreme Court twice, once in Parker v. United States, 397 U.S. 96, 90 S. Ct. 819, 25 L.Ed.2d 81 (1970), and again in Zicarelli v. Investigation Commission, 406 U.S. 472, 32 L.Ed.2d 234, 92 S.Ct. 1672 (1972). In both instances the Court found it unnecessary to answer the constitutional question and left no indication or clue as to what the answer might be. In Parker, the

United States Supreme Court found the question to be moot, and in Zicarelli the constitutional question was not reached.

In Re Parker, the Tenth Circuit Court of Appeals, 411 F.2d 1067, 1070 (1969), said:

> "It is true that Mr. Justice Goldberg, writing for the majority in Murphy, supra, traced the history and importance of the privilege against self-incrimination and in so doing indicated approval of some early English cases where the privilege was thought applicable to a 'foreign jurisdiction' or 'country.' But the Justice's reference to such cases was simply by way of argumentative analogy to this nation's state-federal relationship and carries no further persuasion. The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words 'privilege against self-incrimination,' engraved in our history and law as they are, may turn sour when

triggered by the law of a foreign nation."

The United States District Court of Texas in Re Morahan, 359 F.Supp. 858 (1972), quoted with approval the statement in Parker. On appeal the Fifth Circuit Court of Appeals in Re Tierney (same case as Morahan), 465 F 2d 806 (1972), cert denied 410 U.S. 914, 93 S.Ct. 959, 35 L.Ed.2d 276 (1973), adopted the Parker concept and supported its ruling on the basis that the grand jury proceedings were secret.

.In Re Federal Grand Jury Witness, United States v., Lemieux, 597 F.2d 1166 (9th Cir. 1979), the court followed the rationale used in Re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied 419 U.S. 1038, 95 S.Ct. 525, 41 L.Ed.2d 315 (1974), and held that the fifth amendment did not shield a grand jury witness from the duty of testifying after having been given a grant of immunity on the contention that the

testimony could leak out and subject the witness to prosecution in Mexico and elsewhere.

The United States District Court of Connecticut in Re Cardassi, 351 F.Supp 1080 (1972), and the United States District Court, Eastern District of News York, in Re Grand Jury Supboena of Martin Flanagan, Cv-81-2978 (10 Feb 1982) memorandum and order (not reported as of now) did not follow the Parker case concept.

In Flanagan the court had under consideration the government's motion to compel the witness to testify under a grant of immunity and held that the fifth amendment privilege applied to foreign prosecution (Ireland) and denied the motion. Before reaching this conclusion it observed that the grand jury transcript may be disclosed under Rule 6, FRCrimP,and "reliance on the assumption that the government officials will always maintain the secrecy of grand

jury testimony is both 'inconceivably disingenuous' (In re Lemieux, 597 F.2d at 1168-69), and insufficient to prevail against self-incrimination. In re Cardassi, 355 F.Supp. at 1081." However, the Flanagan case differs in some respects from the instant case. In the instant case the witnesses were granted immunity and testified before the grand jury. The fear of foreign prosecution was not raised by either Runck or Schulz at the time immunity was granted or when they testified before the grand jury. The holding in Flanagan without any reciprocity places the government of Ireland and the individual with a desire to visit and become involved with activities in Ireland in a superior position than the United States government because its penal laws and the individual desires are given a greater priority than the right of our government to obtain testimony in exchange for a grant of immunity under the laws of this country.

In United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977), the court, on page 946-947, said:

> ". . . Zicarelli makes it clear that one invoking the Fifth Amendment privilege has the burden of establishing, first, that the subject of the government's questions raises 'a real danger of being compelled to disclose information that might incriminate him under the foreign law,' and second that there is a 'real and substantial' fear that prosecution by the foreign government might ensue. Only after the witness meets this burden is the government required to show that the foreign government respects the grant of immunity conferred on the witness in order to compel him to testify. See Murphy v. Waterfront Commission, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)
>
> . . . . . .
>
> ". . . While appellees might have argued that some specific question posed by the prosecutor would provide important leads from which evidence could have been obtained by Japanese authorities, their wholesale refusal to respond to any questions posed to them at the trial denied them this chance and was unjustified by the speculative nature of their claim. See In re Parker, 411 F.2d 1067, 1069 . . ."

The court concluded that the threat of foreign prosecution was too chimerical. We note, however, that in the Yanagita case no acts had taken place in a foreign country. It was merely claimed that the Japanese government would claim that their actions here in the United States constituted a crime against Japan. (As noted earlier, the defendants in this case provided us with the Canadian laws on the subject.)

In determining the true and full meaning of the constitutional provision its history is always helpful. Justice Goldberg, in Murphy, supra, referred to some early English cases[9] decided before the United States Constitution was adopted, but those cases involved disclosures which would have been incriminating under a separate system of the laws operating within the same legislative sovereignty. Justice Harlan, joined by Justice Clark, in a concurring opinion in Murphy, stated the countries involved were

considered colonies or the equivalent at the time. As such the broad concept of Murphy would apply. Consequently the early English cases are not very helpful or persuasive as to what influence they may have had upon the framers of our Constitution. We believe the framers of the Constitution were aware of the various laws in the European nations and the interpretations placed upon them permitting unwarranted practices, such as torture or inquisitions to compel incriminating testimony and wanted to provide an assurance that the same patterns would not be followed in the United States. This most likely led to the adoption of the fifth amendment which in material part provides:

> "No person . . . shall be compelled, in any criminal case, to be a witness against himself . . . ."

No reference is made to any foreign law. In our opinion, statements in a constitution, statute, or rule implicitly

apply only to those activities which come within or under the authority of the constitution, statute, or rule, as the case may be, unless expressly stated otherwise. The absence of any reference to any foreign law in whatever form is an indication that the fifth amendment was designed to apply only to the laws of the United States and was not intended to embrace foreign prosecution.

We need to examine only the case law[10] or common law history of the fifth amendment in this country to realize the rocky path [United States v. Murdock, 284 U.S. 141, 6 L.Ed. 210, 52 S.Ct. 63 (1931); second time before the Court at 290 U.S. 389, 78 L.Ed. 381, 54 S.Ct. 223 (1933)] it had before the Murphy decision put it to rest. For a number of years uncertainty existed if and to what extent the immunity given by a state also applied to federal government, and vice versa, if and to what extent the immunity given by federal authorities applied to the states. This question was initially approached on a

piecemeal basis, and only after several decisions on the topic and related matters did the Court specifically rule in Murphy that this immunity unequivocally and fully applied to both sets of government. We must also realize that the relationship between the states and the federal government is that of "E pluribus unum," one nation consisting of several states and not one of independent sovereign nations.

Realistically, notwithstanding Yanagita, supra, the officials of this nation or states cannot be expected to know the various penal provisions written or unwritten of the numerous nations. (However, in this case we have been furnished the Canadian law.) This in itself can lead to endless insoluble problems and could effectively prevent either the federal government or the state government from successfully employing the grant of immunity and the concomitant requirement to testify.

All available idicia militate in favor of the conclusion reached by the Parker court that the fifth amendment does not apply to foreign prosecution.

Currently, we are aware of only some of the problems but we do not know specifically what all may be involved and whether the solution can be properly and effectively accomplished unilaterally or only through reciprocal action. The concurring opinion of Justice White in Murphy illustrates the confusion and difficulties that exist as well as the problems that may develop as a result of granting immunity to a witness by either the state or the federal government which applies both to the state and federal government. If a problem can exist between the state and federal government as to immunity (see Murdock, supra) we can well imagine how much greater and complicated the problems will become if the fifth amendment privilege were to apply with full force to foreign

prosecution.

In brief, if the privilege were to apply to foreign prosecution it would frustrate the effective us of granting immunity in exchange for testimony, or compelling testimony resulting in a grant of immunity. The laws of other countries or nations would actually be controlling in such a situation, rather than the wishes and laws of the state or federal government. This can become more complicated if we realize, which we must, that not all nations are friendly to the United States, and some are anything but friendly if not outright antagonistic.

The problems referred to are somewhat illustrated by the situation created in the instant case. Runck, after pleading guilty to two counts of mail fraud which occurred prior to the Canadian episode, was sentenced on 26 June 1978. His brief states: "[He] testified before a federal grand jury in Minnesota under a grant of immunity."

(9 February 1979). The plaintiffs' brief states: "Runck implicitly acknowledges as appellees argued to the district court, that any state or federal prosecution for this offense in this country is barred by both grant of immunity and by the running of the applicable statute of limitations."

From the record made available to us it appears that at the time he testified before the United States grand jury he did not raise the fifth amendment privilege regarding foreign prosecution. The testimony he gave related to and covered some of the activities regarding the "arson" fire in Canada. The immunity given to him then is and will continue to be in effect. Neither the briefs nor the oral argument suggest that Runck was given limited immunity. Once having testified with immunity on the topic pertaining to a foreign crime, can he now in a civil case claim the alleged privilege against foreign prosecution? Does the law,

either by the constitution or otherwise, give the witness such a choice? He has been rewarded by having been given immunity against both federal and state prosecution on the matter to which he testified. Can he now refuse to testify and renege on the agreement he had entered into? We believe he is in a poor, if not in an untenable, position to now refuse to testify on the grounds that his testimony might subject him to possible foreign prosecution because that same risk was present when he testified before the grand jury.

If the danger of foreign prosecution constitutes a valid basis for refusing to answer pertinent questions, the rationale and doctrine which served as a basis for the grant of immunity as expressed in Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), and Zicarelli, supra, would in effect be overruled and the purpose and basis for granting immunity would be frustrated, if not defeated. Some of the

reasons and justifications for immunity statutes are set out in Kastigar and in footnotes 13 through 21; see also footnote 23 for citation of the 1970 Act relative to immunity of witnesses, 18 USC §§ 6001 to 6005. A grant of immunity invariably is based on something in exchange. Usually it is testimony. The grant of immunity is generally negotiable between the government and the witness and as a result may be limited. Neither the arguments or briefs suggested that the immunity granted to Runck in this instance was limited or qualified.

In the absence of any expressed or implied limitation a witness may not refuse to testify under the fifth amendment privilege if the peivilege has been supplanted with immunity.

Of course, Runck might assert that when he testified he had reason to believe that the grand jury transcript and material would be kept secret. United States v. Postal,

559 F.2d 234 (5th Cir. 1977); In re Trevor Davies Baird, 81-1670 8 C.A. (14 Jan 1981). However, he should also have known that the federal transcript and material could be released on proper application pursuant to Rule 6(e)(3)(C)(i), FRCrimP. Ignoratia legis neminem excusat. Present counsel was not counsel at that stage.

Even though we believe a mutual part with some nations would be desirable we do not have the authority to fashion or develop a mutual understanding or an agreement with other nations as to when and under what conditions immunity should be granted and at the same time provide safe-guards against the granting of unwarranted immunity for a petty offense which in reality could turn out to be a grant of immunity for a serious capital offense. Neither do we have the authority to require Canada or any other country to recognize our grant of immunity. This is a matter that should be

covered by treaty and comes under the jurisdiction of the federal executive and legislative branches of government.

We are aware of the problems that existed between the individual states and the federal government before they were resolved by the courts and appropriate legislatures. These problems occurred even though the states and federal government were under the same legal umbrella, the Constitution of the United States, which contained the fifth amendment. Furthermore, each state had a similar "fifth amendment" provision in its Constitution. With this in mind, we realize how much greater and more difficult the problems between nations are or can be. However until treaties or mutual understandings between this nation and other countries become a reality we are constrained to conclude that the fifth amendment privilege cannot be asserted by a witness on the grounds of possible foreign prosecution. On the basis of this conclusion an immunized

witness may not rely upon a foreign penal law to invoke the fifth amendment privilege.

This concept applies to Runck and Schulz because they were granted immunity and as such could rely only upon the foreign penal law to involve the privilege. But in our opinion the fifth amendment privilege, in the absence of a treaty or understanding, does not apply to possible foreign prosecution.

However, a different situation exists regarding Sobania. Generally a witness not having any immunity need not disclose any specific law to invoke the fifth amendment privilege. The record reflects that Sobania did not receive immunity, therefore he need not disclose whether it is a foreign or local law upon which the fifth amendment privilege is invoked.

In conclusion and in accordance with our opinion, we affirm the orders of the state district court dated 15 July 1981

except as to those parts that refer to and deny the motion to suppress the grand jury transcript and material, on which we abstain.

Olson, D.J., sitting in place of Paulson, disqualified.

[1] Both Runck and Schulz testified under a grant of immunity before a federal grand jury in Minnesota as to their involvement in certain fires, including a fire in Manitoba, Canada, on 18 December 1971. Sobania apparently did not testify and, so far as the record before us reflects, has not been granted immunity. The United States Attorney's office moved the United States district court for the District of Minnesota to release these grand jury transcripts to Phoenix's attorneys. See Rule 6(e), FRCrimP. The motion was granted on 30 November 1979 by Judge Donald Alsop.

[2] The action was initially initiated against Schulz only. Schulz initially refused to answer any questions at a deposition on 12 March 1980 and an order was obtained compelling Schulz to answer questions concerning the fire in Starbuck, Manitoba. At Schulz' second deposition on 7 April 1980 he implicated Runck and Sobania in the fire at Starbuck, Manitoba, and Runck and Sobania were made defendants through an amended complaint dated 16 April 1980.

[3] The two orders referred to are:

The order dated 15 July 1981 captioned "Denying Defendants Various Motions" denied the following motions:

> "1. Motion for Postponement and for Protective Order made by defendant Runck dated 17 October 1980;
>
> "2. Motion for Protective Order made by defendant Schulz dated 27 November 1980;
>
> "3. Motion for Protective Order made by defendant Sobania dated 30 October 1980;
>
> "4. Motion to Suppress made by

defendant Runck dated 31 October 1980."

and ordered:

"2. That the previous orders of this Court regarding defendants Sobania and Schulz will remain in full force and effect;

"3. That the plaintiffs' attorneys will be allowed to proceed with discovery as outlined in the companion order of this Court;

"4. That the plaintiffs will be allowed to utilize the grand jury transcripts and grand jury material referred to in the order of Judge Donald A. Alsop of the United States District Court for Minnesota dated 30 November 1979, in the case at bar;

"5. That the defendant Runck has failed to show any 'real and appreciable danger of incrimination' as is more fully outlined in the Court's Memorandum Opinion;

"6. That the defendant Runck's Fifth Amendment privilege does not apply to testimony he gave before the federal grand jury in Minnesota referred to in Judge Alsop's order or to his activities involving the Starbuck property and fire, including his application for fire insurance and subsequent claim for insurance proceeds later received from the plaintiffs."

The order dated 15 July 1981 captioned "Granting Plaintiffs Various Motions" granted the following motions:

"1. Motion for Order Compelling Discovery from defendant Runck dated 15 October, 1980;

"2. Motion to Compel Discovery dated 1 July 1981."

and ordered:

"2. That the defendant Schulz shall have twenty (20) days from the date of the hearing on 13 July 1981, within which to serve and file interrogatory answers under oath;

"3. That the defendant Sobania shall have five (5) days from the date of the hearing on 13 July 1981, within which to respond to the plaintiffs' Request for Admissions and Second Set of Interrogatories;

"4. That the defendants Runck and Sobania shall have 20 days from the date of the hearing on 13 July 1981, within which to serve and file interrogatory answers under oath in accordance with this Court's order;

"5. That the defendant Runck shall respond to the plaintiffs' attorneys' deposition questions and interrogatories relating to his personal and business background, his general involvement in the used parts business, his general acquaintanceship with the co-defendants, his criminal record, his involvement as a party or as a witness in civil litigation, and his appearance before the United States Grand Jury referred to in the order of Judge Donald D. Alsop of the United States District Court for the District of Minnesota;

"6. That the defendant Runck shall respond to the plaintiffs' attorneys' deposition questions and interrogatories regarding his ownership or former ownership of real property in Starbuck, Manitoba, regarding his application for fire insurance, and regarding his receipt of fire insurance proceeds;

"7. That the defendant Runck shall further respond to questions regarding the fire which occurred at Starbuck, Manitoba, on or about 18 December 1971, including the events surrounding said fire."

[4] Counsel for Schulz withdrew from the case through an order dated 31 July 1981. On 11 September 1981 counsel for Sobania filed a notice of appeal for Schulz, but up until the time of oral argument no separate brief had been filed on behalf of Schulz. However, Sobania's brief indicated that it was filed by counsel for Sobania and Schulz.

[5] This is the motion which was denied on 15 July 1981 by order of Judge Backes, state district court.

[6] We were informed by counsel that federal procedures exist which make an ex parte order appealable only after a hearing on the matter has been had and that the defendants were in the process of accomplishing this.

[7] We are aware that certain cases involving the United States Constitution or statutes are processed through both state and federal courts in that sequence. We cannot say that as a result justice has been improved. In this instance the process in the federal system has not been exhausted or completed. See also, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct.

461 (1964).

[8] In support of their argument the defendants quote from "Canadian Abridgement: (2nd ed.) Vol. 11, Criminal Law, § 9889, 1968 pulibcation, as follows:

> "Section 9889. General Rule. Unless there is a statutory provisions for it, there is no time limitation on prosecution for an offense. At the common law, no time runs against the Crown."

[9] See separate concurring opinion by Justice Harlan joined by Justice Clark in Murphy, supra. The dates of the English cases prior to the adoption of the United States Constitution were either not directly in point or involved a country in the status of a colony. The first case directly in point was in 1851, King of Two Sicilies v. Willcox, 1 Sim (ND) 301, 61 Eng Rep 116.

[10] U.C.L.A. L.Rev., Vol. 5 No. 1 (Jan. 1958).

# APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

United States of America,

Petitioner,

Cr. 6-78-38
Cr. 6-78-39

vs.

Clayton Runck, Jr.,

MEMORANDUM & ORDER

Respondent.

and

Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanese Mutual Insurance Company,

Intervenors.

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James M. Rosenbaum, United States Attorney, Joseph T. Walbran, Assistant United States Attorney, Minneapolis, Minneapolis, Minnesota, attorneys for the United States.

Robert Vogel, Grand Forks, North Dakota, attorney for Defendant.

M. Daniel Vogel, Voge, Brantner, Kelly, Knutson, Wier & Bye, Ltd., Fargo, North Dakota, attorneys for Intervenors.

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Defendant makes a motion to rescind an order of this court dated November 30,

1979, authorizing disclosure of grand jury transcripts and materials preliminary to and in connection with judicial proceedings, namely civil litigation to recover losses due to possible arson and insurance fraud. In April 1977 the defendant was the subject of a grand jury investigation with respect to arson fires and insurance claims at several locations throughout the United States. Following the filing of two informations naming the defendant and other, the defendant pled guilty to two charges of mail fraud on April 17, 1978.

On February 7 and 9, 1979, defendant testified under a grant of immunity regarding a fire in Staburck, Manitoba. That fire is now the subject of a civil lawsuit commenced in the state courts of North Dakota on February 7, 1980. The order authorizing disclosure was obtained in response to a request to the United States Attorney's office by the plaintiffs' attorney in the civil case. Named as defendants in the state court civil

action were defendant Runck, and two alleged accomplices in the starting of the Manitoba fire, Herman Sovania and George Schulz. Schulz also testified before the grand jury investigating Runck on April 7, 1977. According to the United States Attorney, Runck's 1979 grand jury testimony related to Schulz' involvement in the Manitoba fire.

The defendants in the civil suit made motions in state district court for a protective order prohibiting the use of the released grand jury materials and transcripts and to suppress those materials and transcripts. These motions were denied on July 15, 1981. Appeal was taken to the Supreme Court of North Dakota. The instant motion was apparently brought in response to a query by the North Dakota court as to why this matter had not been pursued in federal court.

On March 22, 1982, the North Dakota Supreme Court issued an opinion declining to face the issue of the use of the grand jury materials in the state trial. The court noted

that the defendants were pursuing the matter in federal court and indicated that a ruling by the North Dakota court on that issue would be tantamount to providing an appellate review of the order of this court.

Defendant brought the instant motion on October 15, 1982. On December 2, 1980 a motion for intervention was made by insurance company plaintiffs in the state civil action.

Defendant argues that the order permitting disclosure of the grand jury materials and transcripts should be rescinded because no showing of particularized need was made to justify disclosure. See Fed. R. Crim. P. 6(e); Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979); Dennis v. United States, 384 U.S. 855 (1966). We agree. The ex parte petition by the United States Attorney for disclosure seeks disclosure of only defendant Schulz's grand jury testimony for the reason that "it seems suitable" because it is the prior statement of a witness. The order permitting disclosure

authorized disclosure of all grand jury materials without limitation.

In Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. at 222, the United States Supreme Court set forth the standard for determining whether grand jury secrecy may be broken:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations . . . .

The burden of demonstrating that the need for disclosure of grand jury materials outweighs any public interest in continued grand jury secrecy is on the party seeking that disclosure. Id. at 223. The intervenor insurance companies, the parties who will presumably benefit from disclosure, were the appropriate parties to seek disclosure in the first instance.

No attempt to make a showing was mad in this instance. This is not to say the appropriate showing could not be made; the record before this court is simply inadequate to enable it to ascertain the necessity for disclosure.

Accordingly, petitioner Runck's motion for an order rescinding the order of November 2, 1979 is hereby GRANTED.

Dated: May 21, 1982.

EDWARD J. DEVITT,
Senior Judge
United States District Court

# APPENDIX C

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

| | | |
|---|---|---|
| Phoenix Assurance Company of Canada, Norwich union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company, | ) | MEMORANDUM OPINION |
| Plaintiffs, | ) | File No. 80-333 |
| -vs- | ) | |
| Clayton E. Runck, Jr., Herman Sobania, and George Schulz, | ) | |
| Defendants. | ) | |

On or about October 30, 1980, the Defendant, Clayton E. Runck, Jr., moved the Court for an order suppressing all materials obtained by the Plaintiffs as a result of Plaintiffs being given access to Grand Jury information in the Federal Courthouse in Minnesota. Such access being violative of the rights of Clayton E. Runck, Jr., both as a witness and a potential Defendant in a criminal case to have such Grand Jury proceedings kept secret. The motion was supported by various affidavits and briefs. The Defendant, Clayton

E. Runck, Jr., further moved the Court for an order for summary judgment in his favor on the grounds that the action against him is barred by the applicable statutes of limitations Section 28-01-16(1) North Dakota Century Code providing that such actions as the present one be commenced within six years, such motion being supported by briefs. On or about the 30th day of October, 1980, the attorney for Defendant Sobania moved the Court for a protective order and moved for permission to join the Defendant, Clayton E. Runck, Jr., in his motion for protective order. The Plaintiffs, through their attorneys, resisted the various motions and themselves moved the Court to compel answers to interrogatories and resisted Defendants' motion for protective order, filing briefs in support thereof. A further motion on the part of Plaintiffs was filed on or about December 10, 1980 requesting an order compelling discovery.

The Court in preparing its memorandum decision has reviewed the files and contents

thereof as well as affidavits and briefs in support of the various portions of the respective parties. The Court denies the motions of Defendants and grants those of Plaintiffs (See attached Memorandum). Plaintiff is directed to prepare an order in accordance with this Opinion.

Dated this 2nd day of July, 1981.

BY THE COURT:

_____

Norman J. Backes
Presiding Judge
East Central Judicial District

PHOENIX ASSURANCE COMPANY OF CANADA VS
CLAYTON E. RUNCK, HERMAN SOBANIA
AND GEORGE SCHULZ

MEMORANDUM OF ISSUES

I. Does the grant of immunity supplant the 5th Amendment privilege with respect to an individual who has a real and substantial fear of foreign prosecution?

This issue has not been decided by the Supreme Court. In Zicarelli vs Jersey State Commission of Investigation, 406 US 472, 32 L. Ed. 2d 234, 92 S Ct 1670 (1972) the Court refused to reach this constitutional issue. Lower federal court devisions have reached different results on this issue. See In Re Parker, 411 F 2d 1067 (1969) and In Re Cardassi, 351 F Supp 1080 (D. Conn. 1972). Thus, at the present time the specific constitutional question is still an open issue. Citing the In Re Cardassi case the Second Circuit Court of Appeals in US vs Yanagita, 552 F 2d 940 (1972) stated that the Court "might be willing to assume the interest of a foreign sovereign in prosecuting crimes by our citizens which occur on its soil". The Court also indicated a potential willingness to assume the interest of a foreign sovereign "where the offense falls within a frequently used and clearly defined prohibition enacted by the foreign sovereign". Thus, it appears that the privilege could be applied to the threat of foreign prosecution.

II. Does the Defendant had a real and substantial fear of foreign prosecution?

The standard upon which a valid assertion of privilege is determined is whether the danger of incrimination is "real

and appreciable". Dorgan vs. Kouba, 274 N.W. 2d 167 (ND 1978). The claim must be allowed unless it is "perfectly clear . . . that the witness is mistaken and the answer cannot possibly have such tendency to incriminate". Dorgan, supra. An unfounded suspicion that the information might possibly provide "a link in the chain" of evidence to accuse Defendant of a crime is insufficient reason to invoke the privilege.

There are a variety of factors that can be used to determine whether there is a real and substantial fear of prosecution. In Re Folding Carton Antitrust Litigation, 465 F Supp 618 (1979) cited three specific criteria that could be used.

1. The answer that would be given might in fact have a tendency to indicate a participation in criminal activities by the witness. However, the witness could not refuse to answer questions that would not tend to incriminate.

2. The answers that might indicate participation in the crime could expose the witness to theoretically possible prosecution. If, however, the prosecution is barred by the statute of limitations the 5th Amendment privilege assertion would be invalid.

3. Assuming that the above two factors occur, the court then determines that the threat of actual prosecution is not a remote and speculative possibility.

In this case the Crown Attorney with the Department of Attorney General for the Providence of Manitoba, Canada in the prosecution branch has provided an affidavit stating that there is no active investiga-

tion and no intention to investigate, prosecute or extradite in regard to the fire that is the basis of this case.

## CONCLUSION

The Defendants have failed to show that the threat of actual prosecution is not remote and speculative. Failure to establish the criteria in the determination of a "real and substantial fear" would result in a lack of need to invoke the protection of the 5th Amendment.

# APPENDIX D

STATE OF NORTH DAKOTA — DISTRICT COURT

COUNTY OF CASS — EAST-CENTRAL DIVISION

| | |
|---|---|
| Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Office, and Wawanesa Mutual Insurance Company, Plaintiffs, | REQUESTS FOR ADMISSION AND SECOND SET OF INTERROGATORIES |
| vs. | Civil No. 80-333 |
| Clayton E. Runck, Jr., Herman Sobania, and George Schulz, Defendants. | |

Pursuant to Rule 36 of the North Dakota Rules of Civil Procedure plaintiffs, Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company, requests defendants, Clayton E. Runck, Jr., Herman Sobania, and George Schulz, to respond to the following admissions and second set of interrogatories for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial within

30 days after the service of this request or within 45 days after service of the summons and complaint in the above-entitled action. Failure to respond within the above-mentioned time period will be deemed an admission of the items set forth in this request.

Admission 1. That the plaintiffs were at all times material Insurance Companies operating under the laws of Canada with office located in Winnepeg, Manitoba.

Interrogatory 1. If your answer to the preceeding request is a denial state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 2. That the defendants, Clayton E. Runck, Jr. and George Schulz, were at all times material residents

of Cass County, North Dakota.

Interrogatory 2. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 3. That the defendant, Herman Sobania, was at all times material a Minnesota resident.

Interrogatory 3. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 4. That in October of 1971, Clayton E. Runck, Jr. purchased real estate located in Starbuck, Manitoba, Canada.

Interrogatory 4. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 5. That the building on said property was insured by the defendant, Runck, with the insurance sales firm of Oldfield, Kirby, and Gardner Ltd.

Interrogatory 5. If your answer to the preceeding request is a denial, state

specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 6. That the insurance was a policy of co-insurance Number NW20449 subscribed to by the plaintiffs in the amount of $130,000.00.

Interrogatory 6. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 7. That the defendants, Runck and Sobania, together with their agents and or employees imported agriculture impliments, equipment, and parts into Canada and stored said goods on the property purchased by defendant Runck.

Interrogatory 7. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 8. That on or about the 18th of December 1971, the building located on the property owned by the defendant, Runck, burned to the ground, with the loss of all or substantially all of its contents.

Interrogatory 8. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 9. The prior to the occurrence of the fire on the 18th of December 1971, the defendant, Runck, had decided to intentionally destroy the building located on the property which he owned in Starbuck Manitoba.

Interrogatory 9. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 10. That prior to the occurrence of the fire on December 18, 1971, the defendant, Runck, conspired and planned with the co-defendants and or his agents or employees, to intentionally cause the distruction of the insured premises and their contents by fire.

Interrogatory 10. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 11. That on or about the 18th of December 1971, the defendants,

George Schulz and Herman Sobania, traveled to Starbuck, Manitoba, with the intent of setting the insured premises on fire.

Interrogatory 11. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 12. That the defendant, Sobania, set fire to the insured premises or put in motion a course of events which led to the insured premises being destroyed by fire on or about December 18, 1971.

Interrogatory 12. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 13. That subsequent to the fire on the insured premises on December 18, 1971, the defendant, Runck, was aware of the fact that the insured premises had been intentionally destroyed.

Interrogatory 13. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 14. That this information was never communicated to plaintiffs or the

firm of Oldfield, Kirby, and Gardner Ltd.

Interrogatory 14. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The name and addresses of all individuals with knowledge of such facts.

Admission 15. That the proof of loss filed by the defendant, Runck, in connection with this claim, was false and fraudulent in that it contained an incomplete or misleading statement of the property stored on the insured premises and listed incorrect values for the property destroyed there upon.

Interrogatory 15. If your answer to the preceeding request is a denial, state

specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 16. That in connection with this alleged fire loss and damage, the plaintiffs paid to the defendant, Runck, a total of $75,715.00 pursuant to various policies of insurance that had been issued to him.

Interrogatory 16. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 17. That the total paid out under these policies was fair and adequate compensation for the loss allegedly sustained.

Interrogatory 17. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Admission 18. That the defendant, Runck, intentionally represented to plaintiffs agents that the subject fire was the result of an accident, despite the fact that the defendant, Runck, knew or had reason to know that the subject fire

was the result of intentional acts of the co-defendants and of their agents or employees.

Interrogatory 18. If your answer to the preceeding request is a denial, state specifically the reason therefore including:

(a) The specific reason or reasons for the denial.

(b) All facts upon which you rely to support your denial.

(c) The names and addresses of all individuals with knowledge of such facts.

Dated this 29th day of May, 1981.

VOGEL, BRANTNER, KELLY,
KNUTSON, WEIR & BYE

BY: _____
M. Daniel Vogel
70 North Fifth, P.O. Box 1389
Fargo, ND 58107
Attorneys for Plaintiffs

Office - Supreme Court, U.S.
FILED
AUG 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-128

IN THE

# Supreme Court of the United States

1982

CLAYTON E. RUNCK, JR., HERMAN SOBANIA and GEORGE SCHULZ,

*Petitioners,*

vs.

PHOENIX ASSURANCE COMPANY OF CANADA, NORWICH UNION FIRE SOCIETY, LTD., ROYAL INSURANCE COMPANY OF CANADA, SUN INSURANCE OFFICE, and WAWANESA MUTUAL INSURANCE COMPANY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a civil case, in which an insurance company seeks a refund of losses paid on an insurance policy and alleges that the defendant committed arson, may be compelled to answer potentially incriminating questions, where he has consistently claimed the privilege against self incrimination under state and federal law.

2. Whether the protection, provided by the Fifth and Fourteenth Amendments to the United States Constitution, against self incrimination can be invoked to protect an American citizen against self incrimination as to crimes committed in a foreign country, in this case Canada.

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Table of Authorities | iii |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Constitutional Provisions Involved | 2 |
| Statement of the Case | 2 |
| Reasons Why the Writ Should be Denied | |
| 1. Neither the decision below nor the record raises the questions presented in the petition | 3 |
| 2. The decision of the North Dakota Supreme Court is correct | 4 |
| Conclusion | 6 |


## TABLE OF AUTHORITIES


| | Page |
|---|---|
| *Cases:* | |
| Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978) | 4 |
| In Re Grand Jury Subpoena of Martin Flanagan, 533 F.Supp. 957 (E.D.N.Y. 1982) | 5 |
| Phoenix Assurance Co. of Canada v. Runck, 317 N.W.2d 402 (N.D. 1982) | 1, 3 |
| *Constitutional Provisions:* | |
| Fifth Amendment to the United States Constitution | i, 3, 4, 6 |
| Fourteenth Amendment to the United States Constitution | i |

No. 82-128

IN THE

# Supreme Court of the United States

1982

CLAYTON E. RUNCK, JR., HERMAN SOBANIA
and GEORGE SCHULZ,

*Petitioners,*

vs.

PHOENIX ASSURANCE COMPANY OF CANADA,
NORWICH UNION FIRE SOCIETY, LTD.,
ROYAL INSURANCE COMPANY OF CANADA,
SUN INSURANCE OFFICE, and
WAWANESA MUTUAL INSURANCE COMPANY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

The respondents, Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company, respectfully request that this Court deny the petition for writ of *certiorari*, seeking review of the North Dakota Supreme Court's opinion in this case. That opinion is reported at 317 N.W.2d 402 (N.D. 1982).

## OPINIONS BELOW

The petitioners' Petition for Writ of Certiorari makes no reference to the most recent order of Judge Edward J. Devitt of the United States District Court for the District of Minnesota dated 12 July 1982, granting the respondents access to the grand jury testimony of Clayton E. Runck, Jr. and George Schulz. A copy of the most recent order, marked Appendix A, is attached to this brief. This order was entered following a bench ruling by Judge Devitt at a hearing held on 14 June 1982, in St. Paul, Minnesota.

## JURISDICTION

This is as stated in the petitioners' petition.

## CONSTITUTIONAL PROVISIONS INVOLVED

This is as stated in the petitioners' petition.

## STATEMENT OF THE CASE

The petitioners assert in their Statement of the Case that they have resisted all efforts by the respondents to compel the petitioners to testify and that they have consistently claimed the Fifth Amendment privilege. In fact, the petitioner, George Schulz, testified at a deposition taken in this case on 7 April 1980, in Fargo, North Dakota, and fully implicated himself and the other two petitioners in the planning, execution, and concealment of the arson-fraud referred to in the respondents' Second Amended Complaint.

Mr. Schulz had also appeared before a federal grand jury in St. Paul, Minnesota, on 7 April 1977, and at that time

had admitted his involvement along with that of Mr. Runck and Mr. Sobania in the subject arson-fraud. Mr. Runck appeared before another federal grand jury in St. Paul on 9 February 1979, in exchange for a grant of immunity from further prosecution, and admitted, among other things, that Mr. Schulz had told Mr. Runck of Mr. Schulz's involvement in setting the subject fire. *Phoenix Assurance Co. of Canada v. Runck*, 317 N.W.2d 402 (N.D. 1982), at 412.

The petitioners also assert that the subject grand jury testimony was not lawfully disclosed. The attached order of Judge Devitt, dated 12 July 1982, grants the respondents access to the grand jury transcripts of Clayton E. Runck, Jr. and George Schulz on the basis that the respondents have made the necessary showing of particularized need.

There has not been any trial, and the disputes involved concern pre-trial discovery matters.

## REASONS WHY THE WRIT SHOULD BE DENIED

**1. Neither the decision below nor the record raises the questions presented in the petition.**

George Schulz was granted immunity from prosecution in exchange for his appearing before a federal grand jury. *Phoenix Assurance Co. of Canada, supra*, at 406. He fully implicated the three petitioners then, and he essentially reiterated that testimony at his deposition taken on 7 April 1980. Mr. Schulz made no attempt prior to that time to take an appeal to a higher court, and he has, in effect, waived his Fifth Amendment privilege by having already testified and by not having properly preserved his rights to appeal.

Herman Sobania was not granted immunity from prosecution, and he did not testify before a grand jury. *Id.*, at 406. The court below ruled that he would be entitled to invoke the Fifth Amendment privilege, and there is nothing to establish a connection between his situation and the questions raised here. He has no need to be involved in this proceeding.

The trial court in this case found that Clayton Runck did not face a "real and appreciable" danger of incrimination within the meaning of the applicable North Dakota law. See Appendix C attached to the petitioners' petition, citing *Dorgan v. Kouba*, 274 N.W.2d 167 (N.D. 1978). Here, the North Dakota Supreme Court affirmed the trial court's order relating to the Fifth Amendment issues, and one can reasonably argue that the North Dakota Supreme Court affirmed the decision on the basis that the petitioners had failed to establish that they faced a real and substantial danger of criminal prosecution as a result of any compelled disclosures. The discussion in the decision below relating to the issue of whether the Fifth Amendment privilege can be asserted in the face of a possible foreign prosecution is dicta. Consequently, the decision below does not squarely raise the key issue presented in the petition.

**2. The decision of the North Dakota Supreme Court is correct.**

The court below affirmed the trial court's determination that the petitioners had failed to establish any real and appreciable danger of criminal prosecution as a result of any compelled disclosures. Although the United States Supreme Court has never reached the question of whether the Fifth Amendment privilege extends to a possible foreign prosecu-

tion, there is nothing the petitioners have presented to establish that the court has inaccurately applied any applicable law. The North Dakota court pointed out that Mr. Runck:

> is in a poor, if not in an untenable, position to now refuse to testify on the grounds that his testimony might subject him to possible foreign prosecution because that same risk was present when he testified before the grand jury. *Id.*, at 412.

In effect, the court concluded that Mr. Runck and Mr. Schulz had waived the privilege by agreeing to accept immunity from further prosecution and by testifying to a grand jury about their knowledge of the subject arson-fraud.

The North Dakota Supreme Court opinion does not conflict with any decisions of the United States Supreme Court, and there is no conflict between any courts of appeal on the questions raised. The case relied on most heavily by the petitioners for their argument that the court below has misapplied the law is *In Re Grand Jury Subpoena of Martin Flanagan*, 533 F.Supp. 957 (E.D.N.Y. 1982). *Flanagan*, a lower court decision, is not factually similar to the case at bar. Mr. Flanagan was an unindicted co-conspirator in a gun-running scheme who was brought before a federal district court on a contempt proceeding to compel his testimony before a federal grand jury. The court found that Mr. Flanagan had a reasonable fear of foreign prosecution since the foreign jurisdictions involved were actively prosecuting alleged Irish Republican Army terrorists. Here, the subject fire occurred more than ten years ago, and the Canadian prosecutors with authority to proceed have filed an affidavit with the trial court indicating that they have no present intentions of prosecuting the petitioners. This is completely different from the situation described in *Flanagan*.

## CONCLUSION

First, the decision below does not squarely raise the key issue which the petitioners want this Court to review, *i.e.*, whether the Fifth Amendment privilege applies to a possible foreign prosecution. The question is an important one, but this court should wait for a different case where the problem is more appropriately involved. Second, the decision below was correctly decided, and there is no appreciable chance that the petitioners will be criminally prosecuted. Third, this case is still in a preliminary stage, and denying the petition would uphold the policy of discouraging piecemeal appeals. The petition should be denied.

Respectfully submitted,

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*and Counsel of Record*

# APPENDIX A

---

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

---

UNITED STATES OF AMERICA

vs.

CLAYTON RUNCK, JR.

---

CRIMINAL 6-78-38, 6-78-39

---

NOTICE TO COUNSEL PURSUANT TO RULE 49(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

You are hereby notified in the above entitled case, that on July 12, 1982, we filed the following:

ORDER (Devitt-J) Ordered that Canadian Insurers' Petition for Order dated 5-27-82, is granted since the insurers have now made the necessary showing for the release of the grand jury transcripts. Further Ordered the grand jury testimony of Clayton Runck, Jr. and George Schulz may be disclosed to the insurers and their attorneys in connection with the Civil proceedings pending in the Cass County District Court of North Dakota.

ROBERT E. HESS, CLERK
By SUZANNE H. RUIZ,
Deputy Clerk

NOTICE MAILED TO THE FOLLOWING:

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